

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF HAWAII
3
4 Plaintiffs Kenneth Lake, Crystal) CV 16-00555LEK-KJM
5 Lake, Harold Bean, Melinda Bean,)
6 Kyle Pahona, Estel Pahona, Timothy)
7 Moseley, and Ashley Moseley, for) Honolulu, Hawaii
8 themselves and on behalf of all) May 22, 2017
9 others similarly situated,)
10) MOTION TO DISMISS
11) (8-1) 10/20/2016
12)
13)
14 vs.)
15)
16 Ohana Military Communities, LLC,)
17 Forest City Residential)
18 Management, Inc., and DOE)
19 Defendants 1-10,)
20)
21)
22)
23)
24)
25)

13 TRANSCRIPT OF PROCEEDINGS
14 BEFORE THE HONORABLE LESLIE E. KOBAYASHI
15 UNITED STATES DISTRICT JUDGE

16 APPEARANCES:

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1 MONDAY, MAY 22, 2017 9:48 A.M.

2 THE COURTROOM MANAGER: Civil 16-00555LEK-KJM,
3 Kenneth Lake, et al. versus Ohana Military Communities LLC, et
4 al.

5 This case has been called for a hearing on a motion to
6 dismiss.

7 Counsel, please make your appearances for the record.
8 Please speak into a microphone.

9 MR. SMITH: Good morning, Your Honor.
10 Kyle Smith on behalf of the plaintiffs Kenneth Lake, et
11 al.

12 THE COURT: Good morning, Mr. Smith.

13 MR. WHATTOFF: Good morning, Your Honor.
14 Randy Whatoff and Kamala Haake on behalf of the
15 defendants.

16 THE COURT: Good morning to both of you.

17 First let me address the request for judicial notice. So
18 I reviewed it. I find that it's appropriate for me to take
19 judicial notice of what's been requested, so I will do so. I
20 know that you had asked, Mr. Smith, in your response, but it
21 wasn't -- it's a response, and then within the response you
22 asked for a request for me to take judicial notice of certain
23 things, so I'm going to decline to do so because I don't think
24 it's a separate request.

25 However, of course I looked at Judge Gillmor's orders and

1 I'm actually going to ask you some questions with regard to
2 that, with regard to the motion as in why should I rule
3 differently.

4 But, so, you know, in a sense, I am taking judicial notice
5 because I've, obviously, read it and considered, you know, even
6 had a colleague go on very similar if not the same matters.

7 All right?

8 So let's turn to the motion to dismiss. And I'm happy to
9 hear your argument, which you really know the case better than
10 I do. But as I said, I do have Judge Gillmor's decisions. I'm
11 not bound by them, but certainly I find a colleague's reasoning
12 to be, you know, quite persuasive.

13 So in essence, really, I want to know why you think I
14 should rule differently from her. Clearly UDAP, I don't know
15 if you need to spend that much time, Mr. Whatoff. I must say,
16 a couple areas where I may feel differently with regard to that
17 is the negligent infliction of emotional distress.

18 So I think typically what happens with NIED and IIED --
19 with the intentional infliction of emotional distress, that's
20 often a question of fact, so that's going to go forward, I
21 mean, on the summary judgment level.

22 With negligent infliction, you will, obviously, have to
23 show more than just a general allegation, right, that you've
24 been upset by someone. I recognize that we're at the motion to
25 dismiss stage; however, in light of the fact that there's been

1 a lot of water under the bridge in the case, perhaps you can
2 address the negligent infliction of emotional distress and that
3 prong of the elements with regard to that.

4 The other area where I think I might differ is on the
5 breach of contract. But I just give that as a outline and I'm
6 happy to hear your arguments.

7 All right. Please use the microphone. You're welcome to
8 use the podium or counsel table, but as long as you use the
9 microphone.

10 MR. WHATTOFF: Thank you, Your Honor.

11 Let me start by explaining why this case is different on
12 the general failure to plead exposure to organochloride
13 pesticides.

14 Your Honor, this is no longer a class action complaint.
15 It's a complaint that is being asserted by individuals without
16 pleading requirements under *Twombly* and *Iqbal*. These are the
17 claims that are being asserted in these claims, Your Honor:

18 Count 1 is for alleged breach of a lease requiring that
19 the specific home that the resident lived in by these
20 plaintiffs be safe and inhabitable;

21 Counts 2 and 3 are for breach of implied warranty with
22 regard to that specific home that the plaintiff lived in;

23 Count 4 for unfair and deceptive acts and practices.
24 That's for allegedly telling these plaintiffs that it is safe
25 for them to work and play in their yards when it was not safe

1 for them to allegedly work and play in their yards;

2 Count 5 for negligent failure to warn alleges that Ohana
3 failed to warn these plaintiffs that they, quote,
4 "Intentionally and knowingly exposed plaintiffs and their
5 families to increased risks of cancer and other adverse health
6 outcomes";

7 Count 6, 7, and 8 for intentional infliction of emotional
8 distress, fraud, and negligent misrepresentation.

9 All assert the same misconduct. Every single one of those
10 claims requires these specific plaintiffs to plead that their
11 homes were impacted by unsafe levels of organochloride
12 pesticides.

13 For instance, if the home that the Lakes lived in in the
14 Mololani neighborhood was not impacted by unsafe levels of
15 organochloride pesticides, then Ohana could not breach that
16 lease with respect to that home because that home would be safe
17 and habitable. If a different home in a different neighborhood
18 at a different time period had high levels of OCPs, that's not
19 a breach of the Lake's lease.

20 Nor could Ohana have breached the implied warranty of
21 habitability with the Lakes if there was no high levels of
22 organochloride pesticides around their home. Nor would any of
23 the Lakes' tort claims work because the Lakes would not have
24 been exposed to excess cancer risks.

25 That's why class certification was denied, Your Honor, and

1 that fundamental failure requires the dismissal of the first
2 nine counts of the complaint.

3 Plaintiffs make two responses to this. First, they direct
4 the Court to the Pesticides Soil Management Plan, and I want to
5 emphasize initially just how strange that is, that instead of
6 just going ahead and pleading that these folks were exposed to
7 the OCPs, they don't do this. They cite this outside document
8 outside of the complaint.

9 What is the reason for that, Your Honor? The reason is
10 that plaintiffs can't plead that their homes actually had
11 organochloride pesticides and they are trying to distract the
12 Court with this document.

13 Plaintiffs say, Look, when the plan was drafted, Ohana
14 stated that Ohana would assume that all the homes it was
15 redeveloping were impacted by these pesticides; therefore,
16 plaintiffs should be able to assume that all of the homes at
17 Marine Corps Base Hawaii was impacted by the pesticides.
18 That's the plaintiffs' argument.

19 But the assumption for the plan was for the purposes of
20 redevelopment. The plan makes clear that when Ohana went out
21 and tested these neighborhoods when it first took over managing
22 the homes, it found some homes that had no pesticides
23 whatsoever, had some homes that were below Tier 1 which HDOH
24 says is safe for all purposes; other homes did have Tier 2
25 exceedances, but that didn't meet -- so it's not true that all

1 the homes had these exceedances.

2 What's more, the plan merely describes conditions in
3 certain neighborhoods when it was drafted in 2006. After it
4 was drafted, and before service members like the Lakes moved
5 in, all of the soils from around these homes were removed and
6 replaced or were covered with new clean soils.

7 Plaintiffs' response to that is to say, "Well, that's just
8 what the attorneys are telling you, Your Honor. You shouldn't
9 take that at face value." But if that's the case, Your Honor,
10 then why aren't plaintiffs pleading that these pesticides were
11 around their homes? They cannot because they don't have any
12 evidence to support that assertion.

13 The other argument plaintiffs make is that they say that
14 whether they were exposed to OCPs at their home is not relevant
15 because service members and their families did not confine
16 their activities to their specific homes. They went for walks,
17 they visited other families, they did other activities that
18 would have exposed them to pesticides on the base.

19 There's a number of problems with that argument, Your
20 Honor. First, it's not pled in the complaint.

21 Second, it doesn't fit with the actual causes of action
22 that are alleged in the complaint. It's not a breach of that
23 specific lease if you're exposed to pesticides at another home.

24 Third, that theory of liability would create unprecedented
25 exposure to residents of Oahu.

1 These pesticides are ubiquitous on the island, Your Honor.
2 If your home was built before the 1980s and it's still standing
3 today, it was because it was treated with these organochloride
4 pesticides. It was the only treatment for decades. So the
5 idea that liability exposure might attach because someone
6 visited a home that happened to have these pesticides would be
7 a tsunami of liability for the people of Oahu.

8 More importantly, there has never been any showing and
9 plaintiffs have never pled that that sort of exposure has any
10 adverse health impact.

11 So to conclude on this argument that plaintiffs' failure
12 to plead these issues requires a dismissal of Counts 1 through
13 9, we're not trying to hold plaintiffs to some unreasonable
14 standard, Your Honor. We're not saying that they need to plead
15 the exact percentage around each home. But under the legal
16 theories that they're asserting, plaintiffs do need to plead
17 that their homes had unsafe levels of OCPs. They can't do this
18 because the homes they lived in were either fully addressed
19 before they moved in or never treated with OCPs in the first
20 place.

21 Now, like I sort of alluded to, I think that the reason
22 that Judge Gillmor found differently on that issue, Your Honor,
23 is 'cause Judge Gillmor wanted to see if those issues could be
24 addressed on a class-wide level. And what Judge Gillmor said
25 is it's those -- precisely those differences in the individuals

1 that defeat class certification in this case.

2 And if plaintiffs could plead these issues, what -- you
3 know, maybe some of them could, maybe some of them couldn't.
4 We don't believe that these theories would be viable in any
5 event, but it might get them over the pleadings in some of
6 these, if they could do that. They might, but they haven't and
7 they can't because these plaintiffs haven't experienced those
8 issues.

9 THE COURT: So when you say they haven't experienced
10 these issues, are they too late to have them have leave to file
11 an amended complaint?

12 MR. WHATTOFF: Your Honor, we wouldn't -- I don't
13 think it's possible for them to fix the complaint because I
14 think it would violate Rule 11 for them to plead that they were
15 exposed. I recognize that the Court would be likely to grant
16 leave to amend the complaint in this situation and we wouldn't
17 strongly oppose that here, but we do think that it would not
18 serve any purpose here, frankly.

19 Your Honor, I'll be brief on the UDAP claim. Nothing has
20 changed since Judge Gillmor decided this issue. Three ICA
21 decisions are directly on point that the services prong does
22 not apply to leases. This is not something that hasn't been
23 addressed by the Hawaii state courts. It's been fully
24 addressed. The Supreme Court has denied cert on the issue, so
25 we think that that's a very clear-cut issue.

1 If Your Honor has any questions, I'd be happy to answer
2 them.

3 THE COURT: I don't. Yeah.

4 MR. WHATTOFF: All right. Well, if I may, Your
5 Honor, I'd like to briefly go through some of the individual
6 claims, including the intentional infliction of emotional
7 distress and negligent infliction and point out some of the
8 issues. I'll try to be brief with it, Your Honor, plus please
9 jump in if you have any questions.

10 Your Honor, on the first count for breach of contract,
11 plaintiffs have three alleged breaches. First, they have the
12 safe and habitable housing allegation which I believe they've
13 already addressed. They also claim it was a breach of the
14 lease to fail to make certain disclosures and to fail to fully
15 implement the Pesticide Soil Management Plan.

16 The problem with that argument is there's nothing in the
17 lease that requires either of those obligations, and plaintiffs
18 have not pled anything in the lease that would require those
19 obligations. So that's a fundamental failure of pleading on
20 that first count, Your Honor. It's black-letter law that if
21 you're going to plead a breach of contract, you got to plead
22 the contract provision that you contend was allegedly breached.

23 Those allegations, they might satisfy some other claim,
24 some tort claim or nondisclosure, but they were certainly not
25 breaches of contract, Your Honor.

1 Your Honor, Count 3 is for violation of Chapter 521. That
2 is a claim that was not dismissed by Judge Gillmor. I don't,
3 frankly, understand that claim, Your Honor. There's two
4 provisions that have been identified in the complaint:
5 HRS 521-10 and 521-42(a)(1). Neither of those provisions
6 contain any independent obligations. They merely identify
7 different standards that apply to landlords.

8 Now, in plaintiffs' opposition they say -- I think what
9 they're saying is, Actually we meant to plead 521-42(a)(3),
10 which is the implied warranty of habitability, the
11 codification of that, and if that's the case, Your Honor, then
12 this claim is just duplicative of the second claim. So I
13 believe that this count should be dismissed so that we can get
14 our hands around this complaint and address it properly. As
15 it's currently pled, it's totally unclear what the alleged
16 violation is. There's no specific breach of any statute that's
17 been identified.

18 Your Honor, before I get to IIED and NIED, let me just
19 briefly address Count 5 for negligent failure to warn, Count 10
20 for nuisance, and Count 11 for trespass. Each of those claims
21 assert the plaintiff was exposed to construction dust. But the
22 complaint does not provide any information at all about the
23 nature of this exposure. There's no information about when
24 plaintiffs were allegedly exposed, the duration of any impact,
25 the extent of any impact. That is all information that is

1 uniquely within plaintiffs' purview.

2 The failure to give that information violates under
3 *Twombly* and *Iqbal*, and there is no mere formality, Your Honor.
4 Some of the plaintiffs in this case had lived in neighborhoods
5 where no construction ever took place; other plaintiffs moved
6 into their homes after construction around them was completed.
7 So this is a very much in dispute issue and plaintiffs need to
8 identify when, where, how the alleged dust impact occurred so
9 that we can investigate it and see whether there's any validity
10 to those claims.

11 Your Honor, Count 6 for intentional infliction of
12 emotional distress, that's a unique tort with an exceedingly
13 high-level standard of misconduct, and I would respectfully
14 disagree with Your Honor that it can't be decided on a motion
15 to dismiss. I think the *Ross v. Stouffer Hotel* case is
16 directly on point. It said that this issue could be decided as
17 a matter of law. And that case also said that there must be
18 outrageous conduct that, quote, "Goes beyond all bounds of
19 decency and to be regarded as atrocious, and utterly
20 intolerable in a civilized community."

21 Now, I think we can look at the complaint as it's pleaded
22 and those pleadings don't meet that standard, Your Honor. As
23 pled in the complaint, defendants took over housing in 2006.
24 They did extensive testing. They put together a Pesticide Soil
25 Management Plan. That Soil Management Plan was submitted to

1 the Department of Health and approved by the Department of
2 Health. Whether plaintiffs now disagree with that plan, that's
3 not the type of conduct that is atrocious and utterly
4 intolerable in a civilized community, and I would assert, Your
5 Honor, that that's as a matter of law.

6 THE COURT: But I guess I'm looking at the language
7 here related to the nonmoving party, though. They're saying
8 that as a result of this, your clients had actual knowledge
9 about pesticide levels and failed to disclose that, and that
10 is, you know, appalling, outrageous, etc., as our Hawaii
11 Supreme Court has defined it.

12 MR. WHATTOFF: That's a good point, Your Honor. I
13 think that shows -- that reflects back to the fundamental
14 pleading problem we have here, and that's that these
15 individuals were ever actually exposed to these organochloride
16 pesticides.

17 Agree, Your Honor, that if plaintiffs had pled that their
18 homes had these improper levels of OCPs and we had failed to
19 warn them about that, well, then, yes, maybe that gets them
20 over the hump on that standard. But they haven't pled that,
21 Your Honor.

22 They've pled that these situations existed in certain
23 neighborhoods around certain homes in 2006. After that, Ohana
24 did a ton of work to address the neighborhoods that are covered
25 by the Pesticide Soil Management Plan. Plaintiffs lived in

1 these homes after that work occurred in many instances or were
2 in different neighborhoods in many instances. So plaintiffs
3 have not and cannot plead that they were exposed to these
4 pesticides.

5 But I think that's the fundamental problem, Your Honor.
6 If that had been pled, then potentially this could be
7 addressed, but because it hasn't been pled, the standard can't
8 be met.

9 THE COURT: Okay. So you're saying that they have
10 to plead that they were actually exposed to these pesticides as
11 opposed to that information wasn't disclosed to them before
12 they decided whether or not to enter into the landlord-tenant
13 relationship?

14 MR. WHATTOFF: That's right, Your Honor. That
15 assumes -- the duty to disclose assumes that there were still
16 pesticides present at these homes. It also assumes that these
17 levels of pesticides could ever cause any health effects, but
18 it assumes that -- you only have a duty to disclose if there's
19 pesticides found in the homes. Because they haven't alleged
20 that the home that they leased, the home that they lived at had
21 these pesticides, there's nothing to disclose. There's no duty
22 that could have been breached.

23 THE COURT: Okay. So you're saying that if they had
24 knowledge that in the general area but not in that specific
25 housing that there were at one point certain levels of

1 pesticides for which they basically came up with a remediation
2 plan, that they had no duty to disclose that information?

3 MR. WHATTOFF: I think that's what I'm saying, Your
4 Honor.

5 THE COURT: Okay.

6 MR. WHATTOFF: If that remediation plan was
7 implemented, then there would be no duty to disclose because
8 the alleged negative health impacts would have been fully
9 addressed. And that's the elephant in the room that plaintiffs
10 haven't addressed. They've said, Look, back in 2006 there were
11 all these issues. They haven't said that there were issues
12 while they lived there.

13 THE COURT: But -- but looking at the light most
14 favorable to them, aren't they saying back in 2006 there were
15 all these problems and you came up with a remediation plan, and
16 you need to disclose that to people before they can be
17 knowledgeable about whether or not they want to move into that
18 housing?

19 MR. WHATTOFF: Well, Your Honor, I don't think
20 that's what they're pleading. If that's what they're pleading,
21 then I believe they should assert that in their complaint and
22 we would address it.

23 But for this specific claim, if that's what they're
24 pleading, then that's -- I think that certainly doesn't rise to
25 the level of atrocious and utterly intolerable conduct because

1 what they would be pleading is there was an issue; it was
2 addressed per Hawaii Department of Health; and you didn't
3 disclose that there was an issue that was addressed. And under
4 those circumstances, I don't think that that meets the
5 standard, Your Honor.

6 THE COURT: Okay.

7 MR. WHATTOFF: Your Honor, I think I agree with you
8 on negligent infliction of emotional distress. That is a claim
9 that you must have some sort of physical damage to plead. That
10 hasn't been pled here.

11 There's two other groups of claims I wanted to address
12 quickly, Your Honor, Count 7 and 8 for fraudulent negligent
13 misrepresentation. It's black-letter law that those claims
14 require reliance. This shouldn't be a hard thing to plead.
15 Plaintiffs have to plead that they relied on the alleged
16 nondisclosure, and that they would have acted differently if
17 they had been provided that disclosure. It's a simple thing to
18 do if they can plead it.

19 I don't think they can because there was no reliance.
20 One of these plaintiffs continues to live on base even after
21 the filing of the complaint. So that's a basic requirement of
22 those claims that they need to plead.

23 Finally, Your Honor, Count 9 for unfair methods of
24 competition, as Your Honor may have noticed, that was addressed
25 by Judge Barber[sic], but in a sort of roundabout way --

1 THE COURT: Judge Gillmor you mean.

2 MR. WHATTOFF: I'm sorry. Thank you -- sort of a
3 roundabout way in they thought had to amend and it was
4 dismissed. This problem with unfair methods of competition
5 claim is if it's got to be related to the anti-competitive
6 petition. You've got to allege the nature of the competition.

7 Your Honor, I was going to address the statute of
8 limitations thing, if you have any questions, okay?

9 THE COURT: I don't. Did you want to talk about
10 nuisance and trespass? I don't think this is trespass. I see
11 what they're saying about nuisance, but --

12 MR. WHATTOFF: Well, again, I would just say that it
13 wasn't pled.

14 THE COURT: Right.

15 MR. WHATTOFF: Your Honor, that if these folks say
16 that they were exposed to dust, tell us when, tell us what time
17 period, tell us what the impact was, because there are these
18 different time periods when construction was going on, when it
19 wasn't going on. If you don't plead that, and that's
20 information that is totally within the kuleana of the
21 plaintiffs, we can't address it, Your Honor. Doesn't put us on
22 notice of the alleged misconduct.

23 In summary, Your Honor, we recognize that this is a
24 lengthy motion and I appreciate you giving us so much time to
25 address these issues. The reason this motion is lengthy is

1 because there's numerous problems with plaintiffs' complaint.
2 All that occurred here was plaintiffs' names were added to the
3 caption of a class action complaint. That complaint was
4 significantly defective to begin with, but more importantly, it
5 contains none of the facts that would be necessary to assert
6 individual claims on behalf of these plaintiffs. For that
7 reason, the complaint should be dismissed.

8 Thank you, Your Honor.

9 THE COURT: All right.

10 MR. SMITH: Good morning, Your Honor.

11 THE COURT: Good morning, Mr. Smith.

12 MR. SMITH: I'll try to be equally brief. I'd like
13 to start on that last point which is sort of the pleadings,
14 sort of the attack, this is pled essentially the same as the
15 class complaint and that there are significant -- I'm not sure
16 the phraseology -- but significant problems with the class
17 action complaint.

18 The reality is it should be expected that they are high
19 identical. And the reason is because we amended that complaint
20 per leave of the Court. That complaint was accepted. And then
21 we went through a lot of different -- there was a summary
22 judgment challenge to that complaint that we needed expert
23 testimony on a lot of these same issues. The complaint
24 survived. We told them when it was pled a class that there
25 were going to be follow-up complaints on behalf of the

1 individuals, and so we did use the same complaint.

2 By the way, I apologize for the numbering. What happened
3 was we had the initial mediation for the initial group of
4 filings and it got printed literally at DPR, and it changed up
5 the numbering. So we already have an agreement -- I mentioned
6 in there -- to change that. We left it the way it is because
7 we didn't want to screw up the record for today, obviously.

8 THE COURT: Yeah.

9 MR. SMITH: So the idea that this complaint is very
10 similar, I mean, of course it is because the claims are very
11 similar. We've gone through a lot of background.

12 That being said, if the Court feels that we need to amend
13 to add additional factual content, we can, particularly in the
14 issues of dust and time and frame. You know, you and I are not
15 new to a dust case and in the other one, for example, I didn't
16 have that either. The background really was then for
17 individual people was sorted out in discovery which is exactly
18 what we did in *Barber* where each, you know, through the
19 thoroughness of the discovery, it was laid out without, you
20 know, a complaint that might be, you know, many, many, many
21 pages longer if you included all of that underlying detail.

22 These people clearly did live at Marine Corps Base Hawaii.
23 I think that takes us into the next point which is this context
24 of -- some of your questions were devoted to it -- all these
25 claims survive regardless of some quantum of exposure. And to

1 understand why -- because we are jumping in sort of later in
2 the stream -- we haven't had a lot of the more in-depth factual
3 arguments that we had in front of Judge Gillmor at the motion
4 to dismiss stage.

5 Let me explain why. It's important to understand it's
6 tied to the negligent infliction claim, the intentional
7 infliction claims, and others.

8 What happened is the military can essentially do what it
9 wants when it's changing over housing, using pesticides, etc.
10 But then when it turned to a private contractor, private
11 company that takes over and tells them about this contamination
12 level, what they go out and do is they do thousands of soil
13 tests throughout the base. They then test a subset of those
14 tests and they come to the conclusion that these neighborhoods
15 that they're taking over are so contaminated, we're not going
16 to do additional testing. We're going to assume it's in all of
17 the neighborhoods where there's been no testing.

18 And so rather than going house by house by house by house
19 and say clean, dirty, clean, dirty, they just assume it's all
20 dirty.

21 Now, this is where one of the key issues in the case. At
22 that point they didn't stop and say, "We are assuming it's all
23 dirty; therefore, we're not going to lease those homes. We're
24 going to fix them according to our plan, carry out the fix,
25 make sure it's fixed, and then we will lease."

1 Instead, they carried out essentially a staggered
2 construction leasing project. So they have, you know, cash
3 flow from 2006 to 2014, and they are leasing homes in
4 neighborhoods here -- or I hate to even call them neighborhood
5 'cause the neighborhood's Marine Corps Base Hawaii. They don't
6 even notice these different little delineations on the map.
7 When you PCS in as a military family, you're going to Marine
8 Corps Base Hawaii and it's sold as a community, as a gated
9 community, and that's why the pleadings read the way they do.

10 So you purchase a lease into this community. And Ohana,
11 because of the levels and the exceedances, actually carried out
12 an exposure assessment for living there. And they said, Well,
13 yes, it's over HDOH's Tier 1 level. We're going to create an
14 acceptable level called a Tier 2. I'm giving this background
15 just so we're on the same term, sort of the factual --

16 That Tier 2 level essentially allows you to live or them
17 to say that we're going to do something based upon the use of
18 the site and that's allowed to do that. And that Tier 2 level
19 that they decided was based upon a 6-year exposure assumption
20 for a military family. So they say, Military family, you're
21 going to come to our base housing. You're only going to be
22 here six years because that's two three-year terms or two
23 three-year tours for your family, and we're going to allow you
24 to be exposed to this level. And that's okay 'cause you're
25 only going to be here six years. Even if that changes -- and

1 this is another key part -- it changed the risk exposure from a
2 one-in-a-million chance of cancer and other adverse
3 consequences down to a one-in-a-hundred-thousand chance for
4 that. So essentially there is a risk ascension on behalf of
5 military families on the lease.

6 Now in my mind, that's outrageous for a landlord to do
7 that, if you don't tell a tenant that we've decided and found
8 out that it is contaminated, this base, widespread
9 contamination. We've carried out a risk assessment on your
10 behalf and we're not going to tell you about it, but we think
11 you're okay so long as you only live here for six years.

12 Now mind you, some families live there longer than
13 six years as well. Some families don't live there for
14 six years. The issue that underlies the breach of contract,
15 you know, the IIED and all of this, the real core is that
16 decision making and secret on behalf of these families
17 that live in --

18 THE COURT: So their failure to warn.

19 MR. SMITH: Absolutely. At its crux, that's the key
20 issue for breach of contract.

21 Now, let's talk about that breach of contract. Remember,
22 the Pesticide Soil Management Plan is part of the lease, it's
23 part of the contract, and when we start talking about no duty
24 to disclose this, well, that's crazy. And in part -- and we
25 cited this in our brief -- once you start telling people just a

1 little bit of the truth, that these pesticides might be in the
2 United States, well, that creates an obligation to tell them
3 the full story, and they didn't.

4 THE COURT: Okay. When you say it's part of the
5 lease, how is it part of the lease?

6 MR. SMITH: Yes. It's specifically incorporated as
7 an exhibit and incorporated into the lease itself, these
8 representations. And it's -- the Pesticide Soil Management --
9 or pardon me; I just screwed up my terminology -- the Community
10 Handbook is incorporated into the lease where it says this
11 might be used or may be found in the United States, without a
12 disclosure that it's specifically found --

13 THE COURT: But the soil part wasn't --

14 MR. SMITH: It was not. I apologize.

15 THE COURT: I thought I missed something in reading.
16 Okay. Okay.

17 MR. SMITH: I -- you know --

18 THE COURT: Thank you. No, no, no. Go ahead.
19 Good. This is why --

20 MR. SMITH: The Community Handbook -- thank you,
21 Judge -- the Community Handbook. And that's where it has these
22 essentially misleading assertions of pesticide contamination.
23 And mind you, the Community Handbook is not a Community
24 Handbook for this neighborhood or that neighborhood or this
25 street or that street. It's Marine Corps Base Hawaii, the

1 Community Handbook. When people move there, again, into this
2 gated community, they go all over the place.

3 And I'll tell you the reason why -- and this is just
4 aside -- I got involved in this case is 'cause my kids go to
5 Aikahi. A lot of military families go to Aikahi and they
6 started talking about this. And I said that's crazy; my kids
7 go on the base for parties, I've been in those neighborhoods,
8 everyone's been in those neighborhoods. And that's not cool if
9 you're living there and they're carrying out construction over
10 here and having an impact on the rest.

11 I understand the argument they say, Well, there's no way
12 dust and contamination or whatever we're doing in this
13 neighborhood could have impacted the rest of the base. That's
14 just -- that's a question of fact for the jury.

15 THE COURT: Well, yeah, I think that's sort of the
16 downstream --

17 MR. SMITH: Yes, I agree.

18 THE COURT: But, so this is not a class action,
19 right? Class action's denied.

20 MR. SMITH: Yes.

21 THE COURT: So we're looking at a group of
22 individual plaintiffs. And the argument that I hear from the
23 defendants is that each of the individual plaintiffs need to be
24 as if they are each filing a separate complaint, and there has
25 to be sufficient description as to the particular harm or the

1 particular exposure or the particular misrepresentation that
2 was made to each of them.

3 So what I hear you saying is, well, the whole fact that
4 they're each given the Community Handbook, that's the
5 misrepresentation. And then it goes back to what sort of
6 reliance. I guess you're arguing just general reliance because
7 then they became renters, they became tenants.

8 MR. SMITH: Tenants, yes.

9 THE COURT: But with regard to the other claims that
10 are being made, there has to be a specific, you know -- unless
11 all -- unless the only thing that they're claiming is failure
12 to warn and the misrepresentation in the handbook. That's --
13 if that's what they're claiming, that's what they're claiming.
14 And you're saying they all got the handbook and this was all
15 misrepresentation.

16 But there's so many different claims, I think there's a
17 lot of credence that can be given to the defendants' argument
18 because it's an individual plaintiff situation as opposed to a
19 class action, that they have to each allege specific
20 information as to their specific exposure or reliance or
21 whatever -- what have you.

22 Unless what you're saying it's basically a Community
23 Handbook attached to the lease, that's the misrepresentation,
24 then, you know, I understand that.

25 MR. SMITH: Let me -- yeah. No, I appreciate that,

1 Your Honor. And first I'm not going to -- so the pleading
2 standard's really no different on a Rule 23 than under an
3 individual. I mean, you both have to allege the sufficient
4 facts to establish plausibility. That being said, if the issue
5 for the Court is that you want a specific factual pleading for
6 each plaintiff, that can certainly be done. And that wasn't --
7 that certainly wasn't any kind of, like, intentional oversight.
8 Instead, it was really this is the complaint that we survived
9 all these different challenges on that the Court had been using
10 and that's how we understood --

11 THE COURT: Right. But that's a class action and
12 that's the distinction here. The individual --

13 MR. SMITH: No, I get it. I see your point.

14 THE COURT: Okay.

15 MR. SMITH: That said, Your Honor, by the way, the
16 class wasn't denied. There was a recommendation of denial
17 that -- by Judge Chang.

18 THE COURT: Right.

19 MR. SMITH: We opposed that.

20 THE COURT: Yes.

21 MR. SMITH: Between -- sort of between us chickens,
22 I obviously have my own -- you know, it was very -- in my mind
23 very clear black-letter Ninth Circuit law that that decision
24 was wrong based upon the individual. The reason was the
25 individualized damages was the key issue, and under the Ninth

1 Circuit that's not a basis to deny class.

2 And so it was -- we challenged that finding and
3 recommendation. And during that intervening period is when it
4 was -- the case settled before there was an outcome on that.
5 So yes, there was a recommendation of denial; there was no
6 order adopting that yet.

7 THE COURT: Right.

8 MR. SMITH: That was subject to change --

9 THE COURT: But where we are in this case, though,
10 is they're individuals, not class.

11 MR. SMITH: You're right, Your Honor.

12 THE COURT: Okay. Anything else you want to --

13 MR. SMITH: Yes, if I could just briefly walk
14 through some of those challenges. So I think I dealt with the
15 IIED. I do understand and I'm happy to change up an
16 individualized pleading to one that per plaintiff can be done.
17 Is that the most effective? I personally think it's more
18 effective and makes more sense to do it under the context of
19 discovery, but I see your point.

20 With respect to the -- this reliance argument on the
21 omissions, the reliance is essentially when you fail to
22 disclose material facts, reliance is presumed. And so the key
23 issues of failure to disclose on that reliance issue is
24 satisfied.

25 And then with respect to their specific reliance issue of

1 the Community Handbook, that's expressed, it's part of the
2 lease, they entered the lease. And so you can't as a tenant
3 go, Why do I have to rely on this provision when --

4 THE COURT: Yeah. No, as long as you plead it. And
5 I think that's what they're saying, you just have to plead the
6 reliance. The reliance is, We entered into the lease and we
7 brought our kids here, you know, and then that's what it is.

8 MR. SMITH: Right. And we do plead that, although I
9 don't think we say we relied, and -- I understand.

10 THE COURT: Yeah. Okay.

11 MR. SMITH: Real quickly, on the method of
12 competition, there are landlords in Hawaii that disclose
13 pesticides. That is -- and then in the context of this case,
14 we have a landlord that did not disclose pesticides despite
15 knowledge that the community was impacted. That is unfair
16 competition. And under the statute anyone can bring that
17 challenge for the impact, for the method of competition. That
18 can be a consumer, that actually could be you or me; it's that
19 broad. It's not just a impacted landlord, for example, who
20 feels that they were unfairly competed against. So I wanted to
21 clarify that under the law.

22 THE COURT: Okay.

23 MR. SMITH: With respect to the UDAP challenge, Your
24 Honor --

25 THE COURT: Yeah.

1 MR. SMITH: -- it's kind of odd. They're asking me
2 to change Gillmor's decision on the factual stuff, and I'm
3 asking to change it on the UDAP, right?

4 Under the UDAP issue, I -- the reason I think it's
5 wrong -- and the reason why we replied it and we've asked, and I
6 don't think there's an opposition in their reply to submit it
7 to the Supreme Court -- is the issue is on this consumer
8 standing really that goods and services language. Sale under
9 the statute is defined as lease. So the lease of goods and
10 services satisfies consumer standing.

11 So the real question is is goods and services in Hawaii
12 broad enough to include rental properties? Now, I recognize
13 the Intermediate Court of Appeals under Sierra, McKenna walk
14 down. I get that. But you have to look at that reasoning of
15 Judge Foley that is an outdated understanding of property law
16 based upon just this transfer of property. And one of the
17 cases -- and this was -- and some of the earlier pleadings of
18 their case, but I think we probably are all aware of it, the
19 *Lemle v. Breeden* case where the Hawaii Supreme Court first
20 recognized the warranty of habitability and fitness,
21 specifically said the reason why we're doing this is we're
22 getting away from this outmoded idea of property in Hawaii.
23 It's just a transfer of a property interest instead and it
24 relies upon consumer cases in that case.

25 And the reason is because Hawaii's moved beyond that.

1 They look at rental leases in terms of contract as an exchange
2 of a bundle of rights for different goods and services. And so
3 this entire reasoning of those ICA opinions, which frankly is
4 commandeered by Judge Foley, I just respectfully suggest it's
5 incorrect. And --

6 THE COURT: Well, but it's the law right now.

7 MR. SMITH: Well --

8 THE COURT: And the State Court, the highest court
9 that's interpreted, 'cause the Hawaii Supreme Court has
10 declined to accept cert on those cases, that's the
11 interpretation of Hawaii law. So I understand what you're
12 argument is.

13 MR. SMITH: Okay.

14 THE COURT: It's just, you know, that's the highest
15 court.

16 On the UMOG claim, though, there is a requirement that
17 you -- that a plaintiff, one of the elements that they show
18 which causes injury to business or property.

19 MR. SMITH: Yes. So that injury is that they
20 entered the lease, they expended money for because of this
21 unfair method of competition.

22 THE COURT: So you're saying their property.
23 Obviously, there's no business, right? So the --

24 MR. SMITH: Obviously, there's no business, yes.

25 THE COURT: -- injury to the property, you're saying

1 to their lease?

2 MR. SMITH: Yes.

3 THE COURT: What was injured to their lease?

4 MR. SMITH: Their actual money is their property as
5 well. It's not just limited to real property; it's money
6 damages. So unfair methods of competition isn't only correct
7 if you have injury to a car or something. It's to correct the
8 nature of the competition to make sure there's fair
9 competition. So you don't have to have injury to the house --

10 THE COURT: Okay. But I can see if your argument is
11 because of these misrepresentations, I paid five times on a
12 lease --

13 MR. SMITH: Yes.

14 THE COURT: -- than I would have if I -- if there
15 was fair competition because of some unfair act that the --
16 but -- but correct me if I'm wrong -- is that they can't show
17 that they wouldn't have spent that much money, at least, if not
18 more, if they went outside the base and rented a house. That's
19 the unfair competition.

20 Unfair competition is I come up to you and I say, "All
21 those other places you're looking at, they've all been deemed
22 uninhabitable by the State of Hawaii. So that's why you only
23 pay \$1,500 a month. But what I'm going to give you is a lease
24 for a property. Even though it costs twice as much, 3,000, it's
25 the only place that's been deemed habitable by the State of

1 Hawaii." Okay. It's a completely false representation and so
2 forth. But that's an unfair method of competition 'cause now
3 I'm saying these are inferior and, in fact, illegal households
4 for you to rent, and I have the only legal one, but as a result
5 I'm ripping you off because I'm charging you twice as much.

6 MR. SMITH: Sure.

7 THE COURT: That's to me a colorable UMOG claim.
8 But what your folks are doing is they're staying on base. And
9 even if I assume what you're saying is true, that they were
10 enticed because of this misrepresentation in the Community
11 Handbook so they sort of whitewashed this whole pesticide
12 thing, they're paying X number of dollars which arguably is the
13 same or less than market rate if they went to an outside --

14 MR. SMITH: Sure.

15 THE COURT: -- landlord.

16 MR. SMITH: And in fact, I did -- I did that
17 absolutely. And again, this an aside, but my cousin and her
18 Marine Corps husband who are PCSing here did exactly that
19 because of these issues over contamination, have gone outside
20 and rented elsewhere for less at a place that -- that doesn't
21 have these contamination issues.

22 Absolutely Marine Corps Base Hawaii and OMC, the Forest
23 City, have --

24 THE COURT: That's not what's pled.

25 MR. SMITH: It is. They had a competitive advantage

1 by not disclosing this. And had they disclosed it, those
2 tenants then could have made that choice to go elsewhere and
3 they didn't have that choice. It's absolutely a competitive
4 advantage. It's no different than -- you know, lying about
5 someone else's flaws is really no different than hiding your
6 own in a competitive marketplace.

7 THE COURT: So that's what your saying the nature of
8 the competition is?

9 MR. SMITH: Yes. And the harm is that they were
10 able -- the harm to consumers -- or pardon me -- to the harm in
11 this case is that they got more than they should have for these
12 leases and we paid --

13 THE COURT: How do you prevent these people from not
14 renting outside of Marine Corps Base Hawaii?

15 MR. SMITH: What do you mean? I don't understand.

16 THE COURT: So unfair competition is somehow you do
17 something that prevents people from seeking comparable goods or
18 services --

19 MR. SMITH: Right.

20 THE COURT: -- from a competitor, right? So somehow
21 they blocked them from looking at craigslist or the Star
22 Advertiser or something, you know, or, you know, any other
23 source of information that would have said, "Okay. We can rent
24 this house on base for X" --

25 MR. SMITH: Yep.

1 THE COURT: -- "and we can go and rent in Kaneohe
2 for, you know, 1X," or whatever.

3 MR. SMITH: Yep.

4 THE COURT: Yeah.

5 MR. SMITH: Right.

6 THE COURT: So what's the nature of the competition?

7 MR. SMITH: So the question there is would it be a
8 material fact to renters, right? So if we have two equal
9 properties and they have pricing -- right? -- for whatever it
10 is, and this one is a contaminated community and they don't
11 disclose that, yes, you're on craigslist or whatever and you're
12 saying, "Well, you know, I'm a military family. Essentially
13 the leases are the same pricing. I'm going to go here,"
14 because frankly we all know that Kailua and large parts of
15 Kaneohe and Mololani and everywhere else, they separate based
16 upon the age, right?

17 But so if this is a contaminated property, that then
18 changes the competitive balance for landlords and people who
19 are renting properties off of Marine Corps Base Hawaii.

20 THE COURT: Okay.

21 MR. SMITH: So, Your Honor, I think -- I think we've
22 covered all the issues, but --

23 THE COURT: Thank you very much.

24 MR. SMITH: -- thank you very much. Okay.

25 THE COURT: All right. Mr. Whatoff, I'll give you a

1 brief response.

2 MR. WHATTOFF: Thank you, Your Honor. I'll be very
3 brief.

4 This issue of setting of the Tier 2 EALs, that's what the
5 Pesticide Soil Management Plan is. That lets -- we will assess
6 these higher levels; they were approved by the Department of
7 Health.

8 Now, plaintiffs had pled that what happened here is that
9 those Tier 2 EALs were accepted, they left them in place, and
10 then these plaintiffs lived around these Tier 2 EALs. Well,
11 that would be a different complaint than what they have here.

12 The reason they can't plead that complaint is 'cause
13 that's not what happened here. They did the testing. There
14 were some Tier 2 exceedances. There were some that were fine.
15 They said, Let's be as conservative as possible; let's remove
16 everything. And for that reason plaintiffs can't plead what
17 they were just describing to you here, Your Honor. All of that
18 is outside the pleadings 'cause it didn't take place.

19 On unfair methods of competition, I think you're
20 absolutely right, Your Honor. That *Davis v. Four Seasons* case
21 is directly on point. What plaintiffs are describing are UDAP
22 damages. Unfair method of competition damages are very clear:
23 You have to be harmed by the effect on competition, not these
24 other extraneous situations.

25 Thank you, Your Honor.

1 THE COURT: All right. Thank you. I consider the
2 matter submitted. The court will issue a written decision
3 regarding the same fully -- if not the full decision by the end
4 of the month, an outline, and we'll certainly get it to you
5 next month 'cause we're really getting close to the end of this
6 month.

7 MR. WHATTOFF: Your Honor, if I could be -- one
8 issue very quickly.

9 THE COURT: Yes.

10 MR. WHATTOFF: We filed a motion to transfer the
11 other cases to this courtroom.

12 THE COURT: Yes, and so I need to talk to my
13 colleagues.

14 MR. WHATTOFF: Okay.

15 THE COURT: But my thought is -- and thank you for
16 reminding me that because I wanted to talk to you. My
17 recommendation to my colleagues is that the cases not be
18 transferred but that we all agree that I would handle all the
19 substantive motions in the cases and they would then apply to
20 all of their cases, and that one magistrate judge handle all of
21 these matters. So I believe it's whoever is assigned, which is
22 Judge Mansfield. So he would handle all of the discovery, all
23 of the other issues, so you would have consistency in that.

24 And -- but if they should proceed to trial, everybody's
25 going to try their own cases rather than all the cases come to

1 me and I try all of them. But certainly it makes sense I think
2 for judicial economy that one judge, rightly or wrongly, makes
3 the substantive motions decision and one judge, again rightly
4 or wrongly, make all the discovery rules and rulings so that
5 you have consistency and you have one place to go to seek an
6 answer, so to speak. And so I just have to follow up, make
7 sure my colleagues -- I can't bind them to that, but I think
8 that's the fairest way.

9 And then if they do go to trial, I don't see why, quite
10 frankly, I should do all the trials. But that's what -- and so
11 I hope to get back to you within about a week of today and I
12 will follow through, yeah. So thank you very much.

13 MR. SMITH: Thank you, Your Honor. I was just going
14 to -- on that same issue, we intended to file a response; we
15 just weren't sure.

16 THE COURT: You don't have to because I've been
17 talking to Chief Judge Seabright. I wanted to run it by him
18 and Judge Mansfield first. I don't want to bind Judge
19 Mansfield to something, you know, that he might have objections
20 to. But he's fine with that, as is Chief Judge Seabright, so I
21 just need to talk to my colleagues because it's -- you know, I
22 can't tell them, This is the way we're going to do it. We have
23 to do it by collaboration. If one of them feels differently,
24 I'll let you know.

25 But I'm hoping -- I think they would be okay with that

1 because, you know, I think it's going to be upfront work.

2 MR. SMITH: To be wholly honest, Judge, what we had
3 actually intended on filing was essentially a response saying,
4 Yeah, we support the idea. We really think consolidation
5 rather than transfer for some of those same reasons, that you
6 want to have consistency over, like you said, rightly or
7 wrongly, the outcomes. You want to have them to apply --

8 THE COURT: Right.

9 MR. SMITH: -- like on the pretrial issues as well.
10 So, yeah, to that extent we agree.

11 THE COURT: Yeah. So, I mean, I think that makes
12 the most sense and, quite frankly, the lowest number then would
13 be Judge Gillmor and she's not interested in taking all these
14 cases. I don't blame her, so -- she's on senior status. So
15 then it would be for me to take all of the cases and I think
16 that makes sense for the ruling. I'm not sure that they all
17 need to be tried by the same judge, but I think definitely the
18 substantive rulings and the discovery need to be done in a
19 uniform manner.

20 So I think that accomplishes largely what you folks are
21 seeking. Then we can talk -- you guys can talk with Judge
22 Mansfield in terms of the scheduling of, you know, each of
23 trials should we get to that issue. Okay?

24 MR. WHATTOFF: Thank you, Your Honor.

25 THE COURT: Thank you very much. Have a good day.

1 We're in recess.

2 (Proceedings concluded at 10:37 A.M.)

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COURT REPORTER'S CERTIFICATE

I, DEBRA READ, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. §753 the foregoing is a complete, true, and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, August 25, 2017.

/s/ Debra Read
DEBRA READ, CSR CRR RMR RDR